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NO. 95-595

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HILLER SYSTEMS INCORPORATED, *et al.*
Petitioners,

v.

ISABELLA SERVIS, Administratrix
of the Estate of Peter Thomas Humphrey,
Respondent.

Petition for Writ of *Certiorari* to
the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Although the reasons which warrant grant of a writ of *certiorari* are adequately stated in the petition, a brief reply is necessary to correct assertions contained in the briefs in opposition to the petition filed by Isabella Servis, Administratrix of the Estate of Peter T. Humphrey ("Servis"), the United States of America and the brief filed by Michael G. Miller, executor of the Estate of LCDR William B. Turek and Sadie R. Richardson, administratrix c.t.a. of the Estate of William B. Turek as *Amici Curiae* (*"Amici"*).[1]

THERE ARE COMPELLING REASONS TO GRANT REVIEW IN THIS CASE

The *Amici* contend that because state courts have concurrent jurisdiction in admiralty cases, there is no concern about the loss of federal control over the issue of whether subagents may be considered an "agent" of the United States under the Suits in Admiralty Act, 46 U.S.C. App. § 741, *et seq.* (SAA).

This argument ignores the fact that if the Fourth Circuit's decision remains standing, various state and federal courts will continue to be faced with determining whether or not federal jurisdiction exists in suits involving the United States and its vessels. The lack of uniformity and consistency which results is contrary to the very purpose of the SAA as enunciated by this Court in *Johnson v. U.S. Shipping Bd. Emerg. Fleet Corp.*, 280 U.S. 320 (1929), *overruled in part, Brady v. Roosevelt S.S. Co.*, 317 U.S. 578, *reh. denied*, 318

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[1] Pursuant to Supreme Court Rule 29.6, the Petitioners state that a lisiting of their parent companies and subsidiaries may be found at p. ii of the Petition for Writ of *Certiorari*.

U.S. 799 (1943).[2] Furthermore, while state courts have concurrent jurisdiction over most areas of admiralty law, the SAA mandates federal jurisdiction where the United States is involved.

The issue presented in this case has broad ramifications upon suits involving the United States and its vessels, which should be settled by this Court. Although the *Amici* contend that the issue of agency is a fact-driven inquiry that depends on the circumstances of each particular case, the Fourth Circuit's opinion holds that subcontractors may *never* be considered agents under the SAA. The court stated that it declined to hold the Defendants agents of the United States because to do otherwise

> raises the specter of governmental liability to every act of negligence by a painter or plumber engaged to perform some limited task aboard a United States vessel, regardless of that party's contractual relationship with the government.

Pet. App. 15a. The Fourth Circuit's opinion was a result-oriented opinion which was based on its view of the potential ramifications on future cases. This ruling is not only incorrect as applied in the instant case, but it is contrary to the broad interpretation of the term "agent" in the SAA adopted by this Court, the courts of appeals and to established principles of agency law.

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[2] In *Johnson*, this Court explained that the SAA's requirement of the adjudication of all maritime claims arising out of the possession or operation of United States vessels in one proceeding in federal court assures uniformity as to venue, service of process, rules of decision and procedure, rate of interest and periods of limitation. *Id.* at 326.

THE OPINION BELOW IS CONTRARY TO THE TEXT AND LEGISLATIVE HISTORY OF SECTION 745 OF THE SAA

Servis and the *Amici* are incorrect in contending that the text and legislative history indicate that the term "agent" in the SAA applies only to "general" or "operating" agents of the United States.

The Text of § 745

Servis and the *Amici* contend that the exclusivity clause must be read together with the second proviso of § 745 which deals with the limitation of actions. They conclude that the terms "engaged by the United States" in the second proviso establishes a privity requirement in interpreting the term "agent" in the exclusivity clause.

Even if the language in the second proviso is considered to modify the exclusivity clause, the terms "engaged by" do not create a privity of contract requirement. Under principles of agency law, a subagent of the United States has the same responsibility to the United States as it would if it had contracted directly with the United States. *See River & Offshore Services Co. v. United States*, 651 F. Supp. 276, 279 (E.D. La. 1987); *see also Smith v. United States*, 346 F.2d 449 (4th Cir.), *cert. denied*, 382 U.S. 878 (1965) (the legal title or categorization of the relationship is not determinative of agency status); RESTATEMENT (SECOND) of AGENCY § 5 (1957) (RESTATEMENT). Thus, a subagent may be "engaged by" the United States through an agent of the United States.

Although the court in *Petition of United States*, 367 F.2d 505 (3d Cir. 1966), *cert. denied sub nom.*, 386 U.S. 932, *reh. denied*, 386 U.S. 1000 (1967), found that the exclusivity provision and the second proviso "appear[ed] to be in *pari*

materia, " it reached the opposite conclusion from Servis and the *Amici* and found that a broad interpretation of the exclusivity provision should be adopted. The court stated that "Congress intended to make governmental liability exclusive *throughout a broad spectrum of contractual arrangements* for the operation of public vessels." *Id.* at 511 (emphasis added). Likewise, in *LeBlanc v. United States*, 732 F.Supp. 709, 713 (E.D. Tex. 1990), the court stated that this exclusivity provision is construed broadly to eliminate the uncertainty about who an individual should sue for an injury caused by or occurring on a public vessel.

The opinion below is the only case in which the SAA was interpreted to determine whether a subcontractor can qualify as an agent which found that privity of contract is required. All other cases which addressed the issue found that subcontractors hired to perform obligations of general operating agents of the United States are agents of the United States, and therefore immune from suit under the SAA. *See Walters v. Tidewater Fleet, Inc.*, 847 F. Supp. 464 (E.D. La. 1994); *Servis v. Hiller Systems, Inc.*, 858 F. Supp. 590, *rev'd*, 54 F.3d 203 (4th Cir. 1995); *Bowman v. Pan American World Services, Inc.*, 704 F. Supp. 695 (E.D. La. 1989); *Saffrhan v. Buck Steber, Inc.*, 433 F. Supp. 129 (E.D. La. 1977).[3]

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[3] Servis contends that *Trautman v. Buck Steber*, 693 F.2d 440 (5th Cir. 1982), supports the Fourth Circuit's opinion. However, the court did not address the criteria required for a determination of agency. As the court in *Bowman* explained:

> [t]he question in *Trautman* was whether the plaintiff employee of the subcontractor had a remedy against the United States under Section 741 of the SAA.

Clearly, the text of § 745 does not provide that only general operating agents are considered agents under the exclusivity provision.

The Legislative History

The legislative history does not support the conclusion that subagents are excluded from coverage of § 745. Servis and the *Amici* rely on language in the legislative history which provides that the amendment was intended to be declaratory of existing law. They conclude that because none of the cases referenced in the Committee Reports involved a subagent, Congress intended the exclusivity provision to apply only to general agents.

Contrary to this position, there is no indication in the legislative history that Congress intended to limit the application of the exclusivity provision to the facts of these cases. Merely because the issue of whether subagents fall within the purview of the SAA was not addressed in these cases, does not mean that subagents are excluded from the application of the SAA. Neither Servis nor the *Amici* cite language in the legislative history which states that privity of contract is required or that subcontractors are excluded from coverage.

Servis and the *Amici* argue that the statement in a Committee Report that the amendment was not intended to

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> Since the United States did not own the vessel involved, the issue was whether under Section 741 the vessel was "operated by or for the United States." *The Court in that case never addressed the issue of agency under Section 745 of the Act.*

Bowman, 704 F. Supp. at 698 (emphasis added).

affect the remedies seamen had against "other parties," means that subcontractors are excluded from coverage. "Other parties" merely refers to parties other than "agents" under the SAA. This statement is not in any way inconsistent with a finding that certain subcontractors may qualify as agents.[4]

The only cases in which the legislative history regarding this issue was considered have found that Congress intended to include subagents. The district court in the instant case pointed out that in *Petition*, *supra*, the court found evidence in the Congressional history for a broad interpretation of the term "agent." Pet. App. 36a. When asked for comment on the bill which became § 745, the Department of Justice recommended that the "agent or "employee" language be expanded to read "employee, agent, or instrumentality." In *Petition*, the court stated:

> [t]hereafter, in reporting the final and present text to the Congress, both House and Senate Committees explained "that the language suggested by the Department of Justice in respect of the exclusive provision constitutes an immaterial variation in the language of the bill as drawn." H. Rep. No. 1292 p.5. *This indicates that in the Congressional view the general statement of an agency concept as enacted included any instrumentality through and by which public vessels were operated.*

Petition, 367 F.2d at 510 (emphasis added). *See also*

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[4] The *Amici* contend that "the legislative history states very explicitly that the bill was *not* intended to affect seamen's rights against anyone other than operating agents." *Amici's* Brief at 11 (citing S. Rep. No. 1782, p.1) (emphasis in original). Not only is this not stated explicitly, it is not stated at all.

Saffrhan, supra, 433 F. Supp. at 133.

It is clear that the legislative history supports a finding that Congress intended the SAA to apply to a broad spectrum of entities furthering the interests of the United States, and there is no indication that privity of contract is required.

THE FOURTH CIRCUIT WAS INCORRECT IN APPLYING DECISIONS UNDER OTHER STATUTES

Servis contends that the Fourth Circuit was correct in applying decisions construing comparable statutes.[5] Servis fails to recognize that although the SAA and Federal Tort Claims Act, 28 U.S.C. § 1346(b) (FTCA) contain waivers of sovereign immunity, they are completely different statutory schemes. The SAA is unique in that it contemplates that all claims resulting from an injury which occurred aboard a United States vessel will be resolved in one forum. *See Johnson, supra,* 280 U.S. at 326.

The FTCA, however, waives sovereign immunity only for the negligent or wrongful acts or omissions of *employees* of the United States and does not even contain the term "agent." Thus, the cases decided under the FTCA did not consider the issue of whether there was an agency relationship, the sole issue in the instant case.

Although independent contractors are not covered under the FTCA, it is clear that an independent contractor may be

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[5] Although Servis references the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901, *et seq.*, and *West v. United States*, 361 U.S. 118 (1959), the Fourth Circuit did not rely on the statute, which is not comparable, or the case, which is not applicable.

considered an "agent" under the SAA. *See e.g. Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 795 (1949) ("such words as employer, agent, independent contractor are not decisive."); *Smith v. United States*, 346 F.2d 449 (4th Cir.), *cert. denied*, 382 U.S. 878 (1965) ("[w]hether the agreement constituted [the operator] a charterer, an owner *pro hac vice* or an independent contractor is merely an academic ascertainment.").[6]

Clearly, the terms "independent contractor" and "agent" are not mutually exclusive under the SAA. As the Third Circuit stated in *Petition*:

> [b]ut an independent contractor, no less than a servant may be an agent in that he is employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control and direction in accomplishing some matter undertaken on the principal's behalf.

Id. at 509 (citing RESTATEMENT § 14 N (1957)). There are no comparable statutes which should be considered in determining agency status under the SAA.

THE OPINION BELOW MISAPPLIES THE LAW OF AGENCY

The United States contends that there was no consent to an agency relationship because "[p]etitioners are unable to point to any provisions of [the various contracts] that

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[6] In fact, in the instant case, the Fourth Circuit acknowledged that MTL was an independent contractor and was also an agent of the United States. *See* Pet. App. 11a-12a.

established such mutual consent to establish an agency relationship." Brief of the United States at 5. This argument overlooks the principle of agency law that consent may be implied as well as express. "[A]uthority to do an act can be created by written or spoken words *or other conduct of the principal* which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." RESTATEMENT, *supra*, § 26 (emphasis added); *see also* RESTATEMENT, *supra*, § 26, cmt. b ("The manifestations to the agent can be made by . . . any means intended to cause the agent to believe that he is authorized or which the principal should realize will cause such belief.").[7] To argue otherwise is to contend that subcontractors such as the Defendants do not act in furtherance of the United States' interests when they perform delegated operational duties aboard United States vessels.

The United States also contends that if the petitioners had an agency relationship, the United States would have retained operational control over the petitioners. This argument ignores the well-accepted principle of agency law that day-to-day operational control is not necessary for such a relationship. According to the Restatement of Agency, "[t]he control of the principal does not . . . include control at every moment; its exercise may be very attenuated and, as where the principal is physically absent, may be ineffective."

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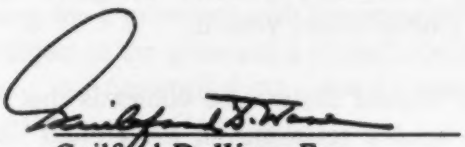
[7] The United States manifested that the Defendants may act on the United States' account in managing and operating the CO_2 fire extinguishing system of the CAPE DIAMOND by its actions during the reactivation of the CAPE DIAMOND and testing its CO_2 system. The Defendants' consent may be manifested by their performance of delegated duties on United States vessels. *See* RESTATEMENT, *supra*, § 15, comment b (if agent performs act requested by principal, it is inferred that he acts as agent).

RESTATEMENT § 14, cmt. a. The United States admitted that all that is necessary for an agency relationship is "overall control." *See* Brief of United States at 4. It is clear that subcontractors can qualify as agents under principles of agency law in keeping with the purpose and intent of the SAA.

CONCLUSION

This Court should grant the Petition for Writ of *Certiorari* to provide lower courts with a uniform interpretation of the provisions of the Suits in Admiralty Act.

Respectfully submitted,



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